No. 277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY S. LITTMAN
317 Wyatt Building
Washington 5, D. C.

JOSEPH J. DANIELS
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis 4, Indiana

ROBERT P. PATTERSON, JR.
PATTERSON, BELKNAP & WEBB
1 Wall Street
New York 5, New York

Counsel for Petitioner

DALE A. WRIGHT
RICHARD LETTELL
MELVIN RICHTER
317 Wyatt Building
Washington 5, D. C.
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Panhandle Eastern Pipe Line Company, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on March 15, 1963.

OPINIONS BELOW

The original opinion of the panel of the Court of Appeals, dated September 27, 1962 (App. A, pp. 1a-13a, 15a) is not reported. The court's *en banc* opinion, dated March 15, 1963 (App. A, pp. 16a-46a) is reported at 316 F. 2d 659. The opinion of the Federal Power Commission (App. B, pp. 1b-6b) is reported at 25 F.P.C. 550.

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on September 27, 1962 (App. A, p. 14a). The judgment of the Court of Appeals sitting *en banc* was entered on March 15, 1963 (App. A, p. 47a). Panhandle's timely petition for rehearing was denied "on consideration" on April 18, 1963 (R. 131; App. A, p. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in fixing rates under the Natural Gas Act, the Federal Power Commission may deprive a natural-gas company of the major portion of the benefits of its deferred tax accruals resulting from its election to use accelerated amortization and liberalized depreciation under Sections 167 and 168 of the Internal Revenue Code where such deprivation is contrary to the intent of Congress and represents a reversal of prior judicially approved Commission decisions on which the company had relied.

2. Whether a circuit judge who has advised the President of his intention to retire "to take effect only when the successor you appoint is ready to be sworn in" is an "active circuit judge," within 28 U.S.C. 46(c), qualified to participate and cast the deciding vote in an *en banc* decision issued on the very day the Senate confirms his successor.

STATUTES INVOLVED

The pertinent provisions of Sections 167 and 168 of the Internal Revenue Code are set out in Appendix C, pp. 1c-4c. 28 U.S.C. 46(c) is set out in the text at p. 19.

STATEMENT

Panhandle Eastern Pipe Line Company (Panhandle) owns and operates a natural gas pipeline system extending in a northeasterly direction from Texas to Michigan. The rates charged by Panhandle for the sale of natural gas for

resale in interstate commerce are subject to regulation by the Federal Power Commission under the Natural Gas Act.

By order issued March 20, 1961, the Commission required Panhandle to file interim rates reflecting an over-all return on Panhandle's transmission properties computed by including as a part of Panhandle's capital the accumulated deferred tax accruals resulting from Panhandle's use of Sections 167 and 168 of the Internal Revenue Code and by allowing a return of only 1.5 per cent on such accumulated tax accruals.[1] A panel of the Court of Appeals initially reversed the Commission's order in a 2-1 decision (App. A, pp. 1a-13a, 15a); but on the Commission's petition for rehearing *en banc*, the court in a 5-4 decision reversed the panel decision and affirmed the Commission's order (App. A, pp. 16a-46a).[2]

Sections 167 and 168

In 1950 Congress enacted the accelerated amortization provision which is now Section 168 of the Internal Revenue Code (App. C, pp. 2c-4c).[3] As the legislative history makes clear, this provision was enacted in an effort to induce industry to inject more capital into the economy and to encourage the construction of certain types of facilities. Under this Section facilities may, to the extent that they have been certified by the appropriate agency as emergency, be fully depreciated for federal income tax purposes over a five year period although the property's useful life is much longer. Thus, other factors remaining constant, during the first five years of the useful life of such property, the tax is lower than it would be with normal ("straight-line") depreciation, under which the deprecia-

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[1] On July 20, 1962, the Commission approved an agreement settling all the other issues in this rate case (28 F.P.C. 200 (1962)).

[2] The *en banc* decision here under review was issued on March 15, 1963, the same day as Judge Edgerton's successor was confirmed by the Senate.

[3] Originally enacted as Section 124A.

tion expense is the same for each year of the asset's life. Since the total depreciable book value of any property is unaffected by the depreciation method used, there is, however, no depreciation allowable for tax purposes remaining after the first five years and consequently taxes are higher during the later years of the useful life of such property than they would be under straight-line depreciation.

In 1954 Congress enacted the liberalized depreciation provision of Section 167 of the Internal Revenue Code (App. C, pp. 1c-2c). This provision was also enacted to improve the nation's economy by encouraging expansion of the nation's productive facilities. Under the depreciation methods authorized by Section 167, the depreciation expense allowed for tax purposes during the early years of the life of the depreciable property is greater than that under straight-line depreciation. Thus, as in the case of accelerated amortization, the use of liberalized depreciation results in greater depreciation allowance and lower Federal income taxes than does straight-line depreciation during the early years of the life of the property. And, as in the case of accelerated amortization, this is offset by lower depreciation allowances for tax purposes, and hence higher taxes, in the later years of the property's life.

Thus, neither accelerated amortization nor liberalized depreciation has any net effect, all other factors remaining constant, on a company's tax liability over the life of the property concerned. Their sole effect is to permit a company, during the early years of the property's life, to accrue deferred tax funds which may be invested in productive facilities upon which the company may earn a return.

The Commission's Prior Treatment of Sections 167 and 168

In August 1952, before electing to use Section 168, Panhandle sought a declaratory order from the Commission as to whether it would be allowed to retain the tax benefits under that provision (R. 31). Thereafter the Commission expanded this proceeding into a rule-making proceeding in which Panhandle actively participated. On December 4, 1953 the Commission handed down its opinion, holding that Congress intended the benefits of Section 168 to inure to the taxpayer companies and that none of the benefits were intended to be passed on to their consumers. *Treatment of Federal Income Taxes As Affected By Accelerated Amortization.* 12 F.P.C. 369 (1953).

In reliance on this ruling, Panhandle elected to use accelerated amortization for federal income tax purposes and expanded its facilities as Congress intended with the funds thus accumulated (R. 31). Thereafter, in a proceeding involving Panhandle's rates, it was contended that some of the benefits resulting from Panhandle's use of accelerated amortization should be passed on to its consumers in the form of reduced rates. Adhering to the position taken in the earlier proceeding, the Commission rejected these contentions and fixed Panhandle's rates by using straight-line depreciation for federal income tax purposes in its cost of service (*Panhandle Eastern Pipe Line Co.*, 13 F.P.C. 53, 81-84 (1954)). In accordance with the policy announced in its earlier ruling, the Commission directed Panhandle to set up a special account for the deferred tax accruals (*Id.* at pp. 83-84) to meet increased taxes which will be experienced in the subsequent life of the property involved. On appeal, the Court of Appeals for the District of Columbia Circuit agreed with the Commission's conclusion as to the Congressional intent and affirmed the allowance of a full return. *City of Detroit* v. *F.P.C.*, 230 F. 2d 810, 822 (1955), *cert. denied*, 352 U.S. 829 (1956). A part of the tax accruals involved in the present case are exactly

the same funds and result from exactly the same facilities as were involved in *City of Detroit*.

With respect to Section 167, after similar rule-making hearings in which Panhandle actively participated as an intervenor, the Commission ruled that both the effect and the Congressional intent with regard to liberalized depreciation (under Section 167) were the same as with regard to accelerated amortization (under Section 168) and concluded that liberalized depreciation should be accorded the same treatment as accelerated amortization. *Amere Gas Utilities Co.*, 15 F.P.C. 781 (1956). Again, it was only after receiving such assurance from the Commission, and in reliance thereon, that Panhandle elected to use liberalized depreciation for Federal income tax purposes and decided to build additional plant facilities with the resulting accruals (R. 31-32).

Subsequently, and through at least September 28, 1960, the Commission continued to adhere to these views. *El Paso Natural Gas Co.*, 22 F.P.C. 260, 265-67 (1959), *aff'd* as to this issue, 281 F. 2d 567 (5th Cir. 1960), *cert. denied*, 366 U.S. 912 (1961); *United Fuel Gas Co.*, 23 F.P.C. 127, 130-31 (1960), *aff'd sub nom. Cities of Lexington, Kentucky, et al.* v. *F.P.C.*, 295 F. 2d 109 (4th Cir. 1961); *Phillips Petroleum Co.*, 24 F.P.C. 537, 570 (1960), *aff'd sub nom. State of Wisconsin* v. *F.P.C.*, 303 F. 2d 380 (D.C. Cir. 1961), *aff'd* U.S. (decided May 20, 1963).

The Order Under Review

On September 10, 1959, Panhandle filed with the Commission, pursuant to Section 4(d) of the Natural Gas Act, schedules of new rates reflecting a 7 percent over-all rate of return on its transmission properties. After hearing, the Commission severed the rate of return issue for immediate decision and on March 20, 1961, issued the interim order here under review (R. 38-43; App. B, pp. 1b-6b).

In this order, the Commission required Panhandle to file interim rates reflecting an over-all return, computed on

the basis of including Panhandle's deferred tax accruals of $11,076,954[4] in its capitalization at a return of only 1.5 percent (R. 38-39, 40; App. B, pp. 3b-4b, 5b). By this means, the Commission reduced the over-all rate of return which Panhandle would otherwise have been allowed from 6.46 percent to 6.25 percent.

In so treating Panhandle's accrued tax deferrals, the Commission relied solely on its opinions issued a few days earlier (March 7 and 8, 1961) in *Northern Natural Gas Co.*, 25 F.P.C. 431,[5] and *Kansas-Nebraska Gas Co.*, 25 F.P.C. 448. In *Northern Natural*, the Commission, in complete disregard of its prior rulings, had held for the first time that it could properly "divide the benefits of liberalized depreciation between the regulated company and the rate payer" with "the major portion of the benefits" going to the latter (25 F.P.C. at 439). Recognizing that failure to allow any return on these tax deferrals would probably result in "the failure of the company to use liberalized depreciation" (*Id.* at p. 438), the Commission determined as "a matter of judgment" (*Id.* at p. 439) and without taking any evidence on the question, that a return of 1.5 percent coupled with "certain material advantages" (*Id.* at p. 441), provided "a sufficient incentive to a regulated company to take advantage of" Section 167 (*Id.* at p. 439). In *Kansas-Nebraska*, the Commission reached the same conclusion with regard to accelerated amortization without further explanation. 25 F.P.C. at 451-452.

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[4] $4,116,859 under Section 167; $6,960,095 under Section 168 (R. 30).

[5] Petitions for review of this opinion were filed in the Court of Appeals for the District of Columbia Circuit. *Northern Natural Gas Co.* v. *F.P.C.*, D.C. Cir. No. 16421; *Public Service Commission of Wisconsin* v. *F.P.C.*, D.C. Cir. No. 16397. Pursuant to the terms of a settlement agreement with regard to Northern's pending rate cases, these cases were dismissed prior to decision by the court.

On appeal filed by Panhandle, a panel of the Court of Appeals, in a 2-1 decision, set aside the Commission order and remanded the case to the Commission for entry of an order allowing Panhandle to retain the full benefits of Sections 167 and 168 (App. A, pp. 1a-13a, 15a). Referring to its prior decision in *City of Detroit*, the court held (App. A, pp. 5a, 9a):

> "* * * the purpose of Congress in enacting the accelerated amortization statute was to encourage industry, including public utilities, to invest more capital in fixed assets and thereby to increase productivity and spur the national economy. If the economic advantage arising out of the accelerated amortization is to be largely passed on to the ratepayers—which is the effect of the Commission's order—the purpose of Congress will be defeated as far as public utilities are concerned.
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> * * *
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> "* * * Congress has not provided that, with respect to utilities, ratepayers are entitled to share in the temporary benefits resulting from the use of liberalized depreciation in computing income taxes. Such a provision, which would put utilities and unregulated companies in different categories, may be within the competence of Congress but neither the Commission nor this court is authorized to legislate in that fashion."

On the Commission's petition for rehearing *en banc*, the court, splitting 5-4, vacated the judgment of the panel, and this time affirmed the Commission's order. App. A, pp. 16a-46a. The court recognized that Congress intended Section 167[6] as "a means * * * to assist modernization and expansion of industrial capacity, with resulting economic growth, increased production and a higher

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[6] For reasons which were not explained, the court considered only Section 167 and completely ignored the fact that $6,960,095 of the tax accruals in question are attributable to facilities amortized by Panhandle under Section 168.

standard of living'" (App. A, p. 19a). The court also recognized that the Commission has a responsibility to effectuate this Congressional purpose in setting rates under the Natural Gas Act; however, the court ruled that the requirements of Section 167 would be satisfied if the Commission allowed only those minimum benefits "necessary to provide incentives to investment" (App. A, p. 21a). Further, the court held that the Commission's result was supported by "sound principles of rate regulation" which, according to the court, require the Commission "to permit the company no more of a return on these funds than that necessary to effectuate the congressional policy underlying the tax statute" (App. A, p. 21a). Finally, the court concluded that the Commission's finding, that a 1.5 percent return together with certain other alleged "material benefits" provided an adequate incentive, was "within [its] expert competence" and should not be disturbed (App. A, pp. 21a-22a).

Panhandle filed a timely petition for rehearing *en banc*. In addition to pointing out the substantive errors, Panhandle questioned whether at the time the *en banc* decision was issued Judge Edgerton was an "active circuit judge" within the meaning of 28 U.S.C. 46(c), *infra*, p. 19. In this regard, Panhandle pointed out that Judge Edgerton had on March 22, 1962 advised the President of his intention to retire "to take effect only when the successor you appoint is ready to be sworn in" and that the Senate had confirmed the appointment of his successor on March 15, 1963, the very day on which the court's *en banc* decision was issued. In these circumstances, Panhandle urged that Judge Edgerton's participation in the *en banc* decision was not consonant with the purpose of Section 46(c). With Judge Edgerton still participating, the court *en banc* denied Panhandle's petition on April 18, 1963.[7]

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[7] Judge Edgerton's successor took the oath of office on April 22, 1963.

REASONS FOR GRANTING THE WRIT

Both of the questions presented by this case clearly warrant review by this Court.

The issue of the propriety of including in the capitalization of a natural gas company its tax deferrals accumulated through the use of Sections 167 and 168 of the Internal Revenue Code at a 1.5 percent return involves a matter of great and continuing importance to the Commission and to the entire natural gas industry.[8] The Commission itself urged the importance of this issue in its petition for rehearing *en banc* and the court below recognized that importance by its grant of rehearing *en banc*.

In light of the prior decisions of the Commission and the court below in which a full return was consistently allowed without reduction for the reserves accumulated under Sections 167 and 168, virtually every natural-gas company has elected to use these sections. Substantial funds have been accumulated as a result of this reliance, aggregating, according to the Commission, some $280,000,000 as of the end of 1962 with respect to liberalized depreciation alone.[9] These accumulated deferrals will continue in existence for some time while they are being used to pay the increased taxes during the later years of the service life of the facilities involved. The decision below improperly sanctions the withholding of the major portion of the benefits of Sections 167 and 168 from the taxpayer companies, contrary to the Congressional intent as clearly

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[8] This question is also involved in cases pending in the Third and Fifth Circuits. *Southern Natural Gas Co.* v. *F.P.C.*, 3rd Cir. No. 14399; *El Paso Natural Gas Co.* v. *F.P.C.*, 5th Cir. No. 20180; *People of the State of California et al.* v. *F.P.C.*, 5th Cir. No. 20203.

[9] See Respondent's Petition for Rehearing *en banc* in the court below (R. 85-86).

expressed by Congress and as explicitly recognized by the Commission and the court below in the past; and it repudiates, without any justification, the assurances upon which Panhandle (and other natural gas companies) elected to use Sections 167 and 168.[10]

The Commission has now followed two entirely different positions regarding the treatment of the tax deferrals arising under Sections 167 and 168. This administrative inconsistency has caused great uncertainty, and has made it impossible for natural gas companies to know the consequences of important tax elections which they are required to make. It is submitted that a question of such importance should not be left for the Commission to decide *ad hoc* "as a matter of judgment," with no discernible standards of guidance. Unless corrected, this may be the result of the approach taken in the erroneous decision of the court below.

The question of Judge Edgerton's participation is also of importance in the administration of justice in the courts of appeals, and it bears upon the validity of the judgment below because the crucial vote thereon was cast by Judge Edgerton. This Court has characterized the proper composition of the courts of appeals in *en banc* proceedings as "an important and useful device in the administration of justice in the courts of appeals * * *." (*Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U.S. 247, 260, fn. 20 (1953)). And it has also recognized that Congress has in 28 U.S.C. 46(c) limited participation in *en banc* proceedings to "active circuit judges" for the purpose of enabling a majority of the court's judges " 'to control and thereby to secure uniformity and continuity in its decisions' * * * ". *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). Judge Edgerton's par-

[10] As noted in the dissent (App. A, pp. 43a, 45a-46a), Panhandle "made clear to the Commission it would not feel justified in making the election without official assurance of full benefit therefrom."

ticipation and his casting of the deciding vote in the instant *en banc* decision, issued on the very day as his successor was confirmed, is completely at odds with this purpose.

1(a). Contrary to the court below (App. A, pp. 19a-21a), Congress clearly intended the benefits of Sections 167 and 168 solely for the taxpayer who makes the investment which Congress sought to encourage; these provisions are not for the benefit of consumers. Before reversing its position in *Northern Natural* and the instant case, the Commission had consistently so recognized. Thus, for example, in *El Paso Natural Gas Co., supra*, 22 F.P.C. 260, 266, the Commission held that "the intent of Congress was not to benefit the consumers * * *."[11] Similarly, prior to its instant decision, the court below had acknowledged (*City of Detroit* case, *supra*, 230 F. 2d 815, 822):

> "* * * [t]he intent of Congress reflected in Section 124A [now 168] is *not* to benefit consumers but rather the taxpayer in order to encourage construction of certain emergency types of facilities. * * * The funds go into a reserve account for the payment of the deferred taxes to accrue over the five year amortization period. *Though thus earmarked, the funds are available for income-producing purposes. Unless this is permitted, it is difficult to see how Panhandle could benefit substantially from Section 124A*" (emphasis supplied).[12]

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[11] See, also *Phillips Petroleum Co., supra*, 24 F.P.C. 537, 570 ("The accelerated amortization provisions were to benefit the taxpayers, not the consumers"); *United Fuel Gas Co., supra*, 23 F.P.C. 127, 131 ("the purpose of Section 167 * * * is not to benefit consumers directly * * *").

[12] The court below purported to distinguish *City of Detroit* as not involving the question of the return to be allowed on those funds (App. A, p. 19a, fn. 4). But, while *City of Detroit* was phrased in terms of whether the reserves should be included in the rate base, the end result is precisely the same whether phrased in terms of rate base, as in *City of Detroit*, or in terms of rate of return

It is these prior views of the Commission and the court below, rather than those now espoused by them, which accord with the legislative history of these provisions. Not only was it Congress' purpose in enacting Sections 167 and 168 to encourage all taxpayers, including regulated utilities, to make increased investments in plant and equipment, as the court below admitted (App. A, p. 19a), but Congress plainly understood that it was essential to the achievement of this purpose that the benefits of the tax deferrals resulting from the use of these provisions should be retained by the taxpayer companies. H. Rep. No. 1337, 83d Cong. 2nd Sess., p. 24; S. Rep. No. 1622, 83d Cong. 2nd Sess., p. 26; 100 Cong. Rec. 3424 (Chairman Reed of the House Ways and Means Committee), 3434 (Congressman Byrnes), 3553 (Congressman Knox).

It is significant that there is "nothing in the language or legislative history of Sections 167 and 168" to support a contention that Congress overlooked "their regulatory consequence" (App. A, p. 41a). On the contrary, "Congress made those sections general in application, with their benefits available to regulated companies as well as unregulated businesses" (App. A, p. 41a). It is beyond dispute that unregulated companies are entitled to the full benefits of these sections without sharing them with their customers, and there is no basis for a different treatment of regulated companies.

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as in the instant case. Since dollars of return are determined by multiplying rate base by rate of return, the same reduction in dollars of return can be achieved by modifying either factor. Thus, limiting Panhandle to a 1.5% return on facilities financed by deferred tax accruals accomplishes precisely the same end result in dollars of return as would be achieved by deducting 77% of these accruals from the rate base.

That *City of Detroit* required the allowance of a full return had repeatedly been recognized by the Commission (See, e.g., *Phillips Petroleum Co., supra*, 24 F.P.C. 537, 571), a recognition reiterated even in the *Northern Natural* opinion (25 F.P.C. 431, 437) on which the Commission based its ruling here.

It is also significant that Congress has been advised on several occasions of the decisions of the Commission and the court below in *City of Detroit* holding that Section 168 was intended to benefit the taxpayer companies, not the consumers. And in 1956, when it decided the *Amere* case, *supra*, the Commission noted that it was calling the decision to the attention of the Chairmen of the appropriate House and Senate committees. 15 F.P.C. at 782; see, also, *El Paso Natural Gas Co., supra*, 22 F.P.C. 260, 266-7. These decisions were again called to the attention of these committees by the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, which after full exploration thereof with responsible Commission officials,[13] noted that "under the regulations of the Federal Power Commission, as upheld by the courts, it has been held that Congress did not intend consumers to benefit through lower rates as a result of tax amortization but rather that the inducement was intended as a benefit to the * * * company." S. Rep. No. 1380, 85th Cong. 2d Sess., p. 4; see, also, pp. 67-68, 81.

In 1957 opponents of the Commission's treatment of Sections 167 and 168 introduced two bills seeking to amend the Federal Power Act to require the Commission to pass on the tax benefits of these provisions to the rate payers. H.R. 5824, S. 2113, 85th Cong., 1st Sess. Those bills failed of passage, while Congress amended Sections 167 and 168 in other respects in 1957 and 1958, without in any way affecting the basic provisions here involved (see 71 Stat. 414, 72 Stat. 1608, 1665). The validity of the earlier holdings of the Commission and the court below was thus approved and affirmed. *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 550 (1940); *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115 (1939).

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[13] See Hearings on Rapid Amortization in Regulated Industries before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 85th Cong., 1st Sess., pp. 421, 439-440, 923.

(b) Both the Commission and the court recognized that Sections 167 and 168 are "tax incentive" provisions; however, they fell into fundamental error of misconceiving the nature of the incentive which Congress intended. This appears clearly from the Commission's opinion in *Northern Natural* on which the Commission relied exclusively in the instant matter. There the Commission purported to justify its allowance of a 1.5 percent return on the ground that this would provide the company "with a sufficient incentive to continue to use liberalized depreciation. * * *" (25 F.P.C. at 439). The legislative history makes clear that Congress intended to provide not merely an incentive "to use liberalized depreciation" but more importantly, as the Commission itself conceded in its brief in the court below (p. 16), an incentive "to foster industrial growth and expansion * * *." This Congressional purpose was completely ignored by the Commission in this case.

The court below was aware of this fatal defect and attempted to cure it by reading into the Commission's opinion a finding which simply is not there. The court volunteered that the Commission's decision "implicitly" recognized that "a return of 1.5 percent provides sufficient profit incentive for the company *to continue generating these funds by investing in plant* and utilizing accelerated depreciation." (App. A; pp. 20a, 21a) (Emphasis supplied.) This is completely unfounded because the Commission did not consider or discuss the question of what rate of return would be required to give the company the incentive for "investing in plant" intended by Congress under Sections 167 and 168.

Although the court attempts to equate the two, an incentive to "invest in plant" is plainly not the same as an incentive to "continue to use accelerated depreciation." Under both Sections 167 and 168, Panhandle has the right at any time to change back to straight-line depreciation for facilities already constructed and in use; but the incentive which might be sufficient to induce the company to

refrain from reverting to straight-line depreciation would have little influence upon the decision to invest in new facilities. This misconception as to the incentive intended by Congress under Sections 167 and 168 is not a matter of mere semantics. It is one of the fundamental issues in this case. The Commission has attempted to substitute a so-called "incentive" of its own invention for that which Congress prescribed, and the court has erroneously given its approval to this result.

(c) Similarly erroneous is the court's purported application of conventional "principles of rate regulation" to the special situation presented by Sections 167 and 168 (App. A, p. 21a). The court assumes that there is an interrelationship, or perhaps even a conflict, between Sections 167 and 168 and the Natural Gas Act, whereas in fact this is not so. On the one hand, Congress intended the taxpayer company, not the consumer, to receive the benefits of Sections 167 and 168 as an incentive for plant expansion. These provisions are not "rate-reducing provisions as to regulated companies" (App. A, p. 43a). Thus, Sections 167 and 168, "unlike the Natural Gas Act itself [are] not for consumer benefit" and have "a different public policy [which] should be given effect as intended by Congress" (*City of Detroit, supra*, 230 F. 2d at 822).

On the other hand, permitting the taxpayer companies to retain the benefits of Sections 167 and 168 does *not* result in penalizing the consumers. They pay virtually the same rates as if the company had elected not to use Sections 167 and 168. As the court below stated in *City of Detroit*, 230 F. 2d at 822:

> "* * * the solution of the Commission does not result in higher rates to the consumer. It simply does not operate to reduce them. It aids Panhandle but neither aids nor harms petitioners. * * *"

See, also, App. A, p. 30a; *United Fuel Gas Co., supra*, 23 F.P.C. at 513. ("The customer is not injured by liberalized

depreciation; it pays a rate as though this tax incentive did not exist"). In a word, Sections 167 and 168 concern only the taxpayer companies and the United States Treasury without, in any way, involving the consumers or Commission regulation under the Natural Gas Act. Consequently, the "principles of rate regulation", invoked by the court below, plainly play no role here.

The court compounded its error by its further suggestion that "principles of rate regulation" require the Commission "to permit the company no more of a return on these funds than that necessary to effectuate the congressional policy underlying the tax statute" (App. A, p. 21a). As stated in the dissent below (App. A, p. 42a):

> "* * * This amounts to saying that Congress made a mistake in making those sections fully applicable to regulated natural gas companies * * * and that the Commission and [the] court [below] have the right to amend the sections in accord with their 'economic and regulatory philosophy'."

Patently, it is not within the province of the Commission, under the guise of "expertise" or administrative discretion to reduce the inducement fashioned by Congress. It was Congress which determined the quantum of the incentive and made it equally applicable to every segment of American industry, including the natural gas industry. If the benefit provided is to be changed, it is for Congress—not the Commission (or the court below)—to take the appropriate action.

(d) The Commission and the court erred in concluding that the requirements of the tax statute would be satisfied by a return merely sufficient to induce the taxpayer companies to use Sections 167 and 168.[14] Even assuming for

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[14] The court's characterization of this conclusion as "a matter of judgment" (App. A, p. 22a) does not operate to relieve the Commission of the duty to make "basic findings supported by evidence and ultimate findings which flow rationally from the basic findings * * *" (*Capital Transit Co.* v. *P.U.C.*, 213 F. 2d 176, 187 (D.C. Cir. 1953), *cert denied*, 348 U.S. 816 (1954)).

purposes of argument that this is the proper test, the court below still erred in affirming the Commission's conclusion that a 1.5 percent return together with "other 'material advantages'." would satisfy this requirement. Not only is there nothing in the instant record to support such a conclusion,[15] but the record contains conclusive evidence to the contrary (see R. 31-32). As the dissent below noted (App. A, pp. 45a-46a), Panhandle "made clear to the Commission it would not feel justified in making the election without official assurance of *full* benefit therefrom," and as the dissent below further commented (App. A, p. 44a) the "other 'material advantages' do not compensate Panhandle for the loss of a fair return on facilities acquired with tax deferrals." In any event, these alleged "other 'material advantages' ", and the 1.5 percent return, fall far short of providing the benefits which Congress intended the taxpayer companies should have under Sections 167 and 168 as an effective inducement for increased plant investment.

2(a). On March 22, 1962, Judge Edgerton advised the President of his retirement "to take effect only when the successor you appoint is ready to be sworn in." Pursuant to this advice, the President nominated Carl A. McGowan as Judge Edgerton's successor and the Senate confirmed this appointment on March 15, 1963 (109 Cong. Rec. 4150) (daily ed.).

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[15] The various computations referred to by the Commission in the *Northern Natural* case (25 F.P.C. at 439-441) are based on the record in that case, to which Panhandle was not a party. And even these computations do not support the Commission's result as the Commission itself admitted (25 F.P.C. at 439). While the 1.5% return was purportedly justified on the theory that the company would earn approximately the same amount if it had borrowed these funds instead of using Sections 167 and 168 (*Ibid.*), the Commission admitted that "it is probably neither fair nor realistic to assume that [the company] will *borrow* all of this money" (*Ibid.*) (Emphasis supplied). It further recognized that "it would be more fair to consider that additional moneys would be obtained without substantial change in the existing ratio between debt and equity * * *" (*Id.* at 438).

We respectfully submit that in these circumstances, Judge Edgerton was disqualified from participating and casting the deciding vote in the *en banc* decision issued herein on March 15, 1963, the very day on which his successor was confirmed, because he had then ceased to be an "active circuit judge" within the meaning and intendment of 28 U.S.C. 46(c) which provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in *active* service. A court in banc shall consist of all *active* judges of the circuit." (Emphasis supplied)

This Court's decision in *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), clearly discloses that Judge Edgerton had ceased to be a permanent active circuit judge before he cast the controlling vote in the decision below. In that case, Judge Medina of the Second Circuit participated in the original panel decision and the granting of rehearing *en banc* but retired before the issuance of the *en banc* decision. In holding that in these circumstances, Section 46(c) barred Judge Medina's participation in the *en banc* decision, this Court espoused the view of Judge Maris[16] that an essential function of *en banc* proceedings is to secure uniformity and continuity in the court's decisions for the foreseeable future (360 U.S. at 689-690):

> "'The principal utility of determination by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having

[16] Section 46(c) had its genesis in the proposal made in 1944 by Judge Maris as Chairman of the Judicial Conference Committee on the Revision of the Judicial Code. See *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U.S. 247, 253-254 (1953).

> panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.' Maris, Hearing and Rehearing Cases in Banc, 14 F.R.D. 91, at page 96 (1954)."

In the same vein, this Court further pointed out that "Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of *en banc* decision to the permanent active membership of a Court of Appeals" (*Id.* at 689) since "the evident policy of the statute was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court * * *'" (*Id.* at 690).

The thrust of this Court's holding is to remove any doubt that Judge Edgerton no longer was "an active circuit judge" within Section 46(c) at the time the instant *en banc* decision was issued. When Judge Edgerton advised the President of his intention to retire, he took himself out of "the permanent active membership of [the] Court of Appeals." The confirmation of his successor further emphasizes the fact that Judge Edgerton had ceased to be in a position to "determine the major doctrinal trends of the future for" the court below.

(b). The applicability here of *American-Foreign S.S. Corp.* is unimpaired by the fact that in that case Judge Medina's retirement became effective virtually immediately, whereas Judge Edgerton had conditioned the effective date of his retirement upon his successor's being "ready to be sworn in." Not only was this condition on the verge of fulfillment, if not fulfilled, on the date the *en banc* decision was issued, but the consequences of the condition which Judge Edgerton imposed are so inconsistent with the thrust of Section 46(c) as to require denial of its effectiveness under that section. Indeed, the practical consequences flowing are indistinguishable from those attending Judge Medina's retirement. The instant *en banc* decision no more reflects the views of the majority of "the permanent active membership" of the court below than did the *en banc* decision which this Court vacated in the *American-Foreign S.S. Corp.* case because of Judge Medina's participation.

Nor can it be validly contended that giving effect to Judge Edgerton's condition would have the merit of enabling him to break ties among his brethren and thereby avoid the need to "suspend [the court's] judicial task" (see *American-Foreign S.S. Corp.* v. *United States*, 265 F. 2d 139, 154 (2d Cir. 1959)). This would frustrate the intent of Congress, which for the extraordinary purposes of the *en banc* proceeding, carefully defined those participating to exclude retired Justices, retired circuit judges, judges of other circuits and district judges, all of whom may sit in panel proceedings by assignment. Moreover, this very argument has already been rejected by this Court in the *American-Foreign S.S. Corp.* case. As pointed out by the Government in its brief in that case (Br. for the U. S. in No. 138, Oct. T., 1959 at pp. 13-14), the court below could have carried the case through to ultimate disposition by an even number of judges or withheld its decision so as to give the new active judge an opportunity to participate. See, also R. 136.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HARRY S. LITTMAN
317 Wyatt Building
Washington 5, D. C.

JOSEPH J. DANIELS
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis 4, Indiana

ROBERT P. PATTERSON, JR.
PATTERSON, BELKNAP & WEBB
1 Wall Street
New York 5, New York

Counsel for Petitione

DALE A. WRIGHT
RICHARD LITTELL
MELVIN RICHTER
317 Wyatt Building
Washington 5, D. C.
Of Counsel

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